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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1915
No. 290

NEW YORK LIFE INSURANCE COMPANY,
Petitioner,
vs.
EFFIE J. GOULD DUNLEVY,
Respondent,

BRIEF FOR RESPONDENT.

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Filed this _____ *day of February, 1916.*

JAMES D. MAHER, Clerk.

By _____ *Deputy Clerk.*

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BRIEF FOR RESPONDENT.

Statement of the Case.

A restatement of the case by respondent is necessitated by misleading and erroneous statements of fact contained in the petitioner's brief. In answering and correcting the same the respondent will endeavor to parallel the arrangement contained in the petitioner's brief.

The question in the case is this: Has the Federal District Court for the Northern District of Cali-

fornia failed to give full faith and credit to the judicial proceedings of a sister state, when it rendered judgment to respondent in spite of an exemplified record of the State of Pennsylvania, set forth in petitioner's answer as a plea at bar?

The facts are as follows (note as stated before, respondent will parallel the arrangement of the petitioner's brief and comment upon the facts set forth under a corresponding number):

1. The statements contained in 1 of petitioner's brief are substantially correct.

2. The statements contained in 2 of petitioner's brief are correct.

3. The statements contained in 3 of petitioner's brief cannot be considered by this Court. They have been taken from an agreed statement as to what Joseph W. Gould would have testified if called as a witness in this case (p. 120). The Court cannot consider the purported testimony of Joseph W. Gould, inasmuch as the same has not been brought to its attention in the form of findings. The decision in the Circuit Court of Appeals in regard to this testimony determined that:

> "The record discloses no findings of facts either general or special in accordance with Sections 649-700 of the Revised Statutes, and no requests for instructions. In the absence of findings of the trial court inferences of fact to establish ultimate facts cannot be drawn by an Appellate Court from the testimony to be found in the record. Norris v. Jackson, 9 Wall. 125; W. L. Perkins Co. v. Von Baumbach, 185 Fed. 265; Streeter v. Sanitary Dist.

of Chicago, 133 Fed. 124; Anglo-American Land M. & A. Co. v. Lombard, 132 Fed. 721. * * * It follows that the stipulation as to the testimony which would have been given by Joseph W. Gould if called as a witness in the present case must be disregarded" (pp. 141 *et seq.*).

4. The statements contained in 4 of petitioner's brief are correct.

5. The statements contained in 5 of petitioner's brief are correct. One statement may be misleading. There is an inference in the clause "thereby admitting its indebtedness on account of said policy * * *" that the answer of petitioner to the garnishment was, that it was indebted to Effie J. Dunlevy. The answer did not disclose an indebtedness to Effie J. Dunlevy. It merely admitted that the Insurance Company owed either Mrs. Dunlevy or her father (pp. 44-47 inc.).

6. The statements in 6 of petitioner's brief are correct. However, it may be well to point out how the petition referred to therein, came to be filed. The petitioner was served with garnishment process in *Boggs & Buhl v. Dunlevy,* which process directed petitioner to withhold property of Effie J. Dunlevy. In its garnishment answer petitioner as the person garnished, stated it did not know if it had property of Effie J. Dunlevy. The property which Effie J. Dunlevy claimed, was also claimed by her father, Joseph W. Gould. Then petitioner petitioned for an interpleader between Effie J. Dunlevy and Joseph W. Gould. This interpleader could be

desired for only one purpose in view of the garnishment process served. The purpose was to see if the garnishment process withheld anything—that is whether the petitioner had property of Effie J. Dunlevy. The petition for interpleader therefore called for a reference of the question of ownership of property.

The petitioner also prayed to be allowed to pay the money into Court when it was decided who owned the indebtedness.

An order was made the same day granting the interpleader and allowing payment into Court when ownership of the indebtedness was ascertained. The order also directed that a copy thereof should be served personally on Effie J. Dunlevy in California.

7. The statement contained under number 7 is misleading. Effie J. Dunlevy was not "duly and personally" served with the order to show cause. The alleged process was a notice to Effie J. Dunlevy calling upon her to defend certain rights which she might have in an indebtedness of the petitioner. The alleged process was issued by the State of Pennsylvania on February 5, 1910, made returnable the 26th day of February, 1910, and served upon Effie J. Dunlevy in California, February 18, 1910. The statement "duly and personally served" assumes a factor which is in issue in this case and must be decided by this Court. The alleged process was served outside of the limits of the jurisdiction issuing it, was made returnable twenty-one days after issuance, and served eight days before the re-

turn date. Inasmuch as the alleged process called upon Effie J. Dunlevy and Joseph W. Gould to appear and prove their claims to an indebtedness of the petitioner, it is therefore an issue whether Mrs. Dunlevy was "duly and personally served".

The term "alleged" process has been used advisedly for we shall presently show that there was, in fact, no process at all served upon respondent.

The respondent here desires to call another fact to this Court's attention. In point of time, matters contained in 11 of petitioner's brief comes in at this place. The present action was commenced in California, January 14, 1910. The gist of the action was that the petitioner was indebted to respondent. In order to determine Joseph W. Gould's claim, he was made a party defendant and was served with summons in California, January 18, 1910 (p. 14).

The petitioner was served with summons and demurred February 16, 1910 (p. 11). Then, at the time Effie J. Dunlevy was served with the alleged process in a distant State in the proceedings which are the subject matter of the plea in bar, this action had been commenced in California and personal jurisdiction had of all parties claiming any interest in the subject matter, all having been served in the State of California.

8. The facts stated in petitioner's brief under number 8 are correct. However, the respondent desires to call to the Court's attention that the matters there set forth occurred after the California

Court had personal jurisdiction of all parties and that petitioner, neither at that time nor at any time, called the Pennsylvania Court's attention to this fact. Respondent desires further to call the Court's attention to the fact that the property in dispute between respondent and Joseph W. Gould was a debt which was only held in Pennsylvania by the garnishment process directed to and served on petitioner, if considered as property of Effie J. Dunlevy. Before this determination was made, as set forth under number 8 of petitioner's brief, petitioner with knowledge that it was in issue and with knowledge that the California Court had jurisdiction of all parties thereto, prayed to be allowed to convert the debt into money and pay the same into Court. This petition was granted by the Court.

Is the petitioner entitled to much consideration when it had its choice between a Court admittedly having jurisdiction over all the parties and a Court having doubtful jurisdiction and decided to pay the money into the latter Court?

9. The statements made in petitioner's brief under number 9 are correct.

10. The statements contained under number 10 of petitioner's brief are misleading.

The assumption contained in the first paragraph is not justified in view of this action and the position continually assumed by petitioner and the Courts of Pennsylvania. The petitioner has in this action assumed that it has never owed an indebtedness to Effie J. Dunlevy. The State of Penn-

sylvania has determined that the petitioner did not owe an indebtedness to Effie J. Dunlevy—and still petitioner, for the purpose of proving the proceedings of the Pennsylvania Court a plea in bar, assumes that it did owe an indebtedness to Effie J. Dunlevy. This assumption can not be made. The petitioner has defended with the proceeding of a sister State as a plea in bar. The proceeding determines that its garnishment process did not withhold any property of Mrs. Dunlevy. The petitioner cannot rely upon and at the same time repudiate the proceeding set up by it and maintain that it did withhold property of Mrs. Dunlevy.

The process of garnishment issued out of *Boggs & Buhl v. Dunlevy* and served upon the petitioner, was directed against Effie J. Dunlevy's property. The petitioner stated it had an indebtedness owing to either Effie J. Dunlevy or Joseph W. Gould. The interpleader action wherein a "feigned issue" was raised between Joseph W. Gould and Effie J. Dunlevy, though it did not have jurisdiction of the latter, rendered the garnishment process nugatory, for, by the judgment rendered therein it was determined that there was no property of Effie J. Dunlevy's in petitioner's hands. In other words the garnishment process, to be good, needed the factor of property of Mrs. Dunlevy's in petitioner's hands. A reference was made to determine this question. The reference determined that there was no such property. The whole situation is the same as if the Pennsylvania Court commanded petitioner to "retain all property of Effie J. Dun-

levy. However, on second thought we perceive you have no property of Effie J. Dunlevy. Consequently you can not comply with our demand".

(a) Under (a) of number 10 of petitioner's brief it is recognized that the "feigned issue" was but a reference to determine the effectiveness of the garnishment process, and if petitioner is logical we must conclude that the garnishment process was rendered nugatory by that reference.

In regard to the "reference", however, petitioner makes two statements which cannot go unexplained. The "reference" was for the purpose of ascertaining the ownership of a debt and thereby the effectiveness of the garnishment—not the ownership of a certain sum of money. Petitioners may answer the two are the same—but are they? Effie J. Dunlevy claimed an indebtedness, which was payable in the State of California, where she, assuming her to be the creditor, was to be found. Money is a physical object, while an indebtedness is intangible. Jurisdiction over money may be had where it is found. Jurisdiction of a debt, except in a case of valid garnishment is had where the creditor can be found. Petitioner took a sum of money from its pockets and said this is the property in issue, and requested a determination by the Pennsylvania Court.

The second misleading statement is that Effie J. Dunlevy was in Court in the garnishment proceedings. Nothing is offered to prove this. She was not in Court. She was in the State of California,

where she had been served personally with alleged process calling on her to contest a personal claim in Pennsylvania. This "reference" in which she was named as a party, but not served personally, has two phases, namely:

(1) As a determination of the effectiveness of the garnishment process.

(2) As a determination of Effie J. Dunlevy's and Joseph W. Gould's rights in the indebtedness of petitioner.

The first is dependent on the second. The garnishment process was determined by the judgment in the "feigned issue" that Effie J. Dunlevy did not own the property. The injustice of a determination of Mrs. Dunlevy's rights in no way affects the fact that the garnishment process was void. Whether rightly or wrongly determined the sovereign which commanded the restraint of Effie J. Dunlevy's property, determined she had no property and the garnishment therefore was rendered nugatory.

Pennoyer v. Neff, 95 U. S. 714.

But the determination of the second must be considered improper. Her rights were determined without personal service of summons on her within the State of Pennsylvania. Those proceedings determining she had no rights have in this case been offered as a plea in bar.

(b) Facts stated in (b) under number 10 of petitioner's brief are substantially correct subject to the explanation set forth above.

(c) Facts stated in (c) under number 10 are substantially correct subject to the explanation made above.

11. The statements set forth under number 11 of petitioner's brief are correct subject to statements made in 7 herein.

Restatement of the Facts.

Shorn of extraneous matters the facts are these:

A judgment was rendered against Effie J. Dunlevy in the action of *Boggs & Buhl v. Dunlevy.* Several years later a garnishment was issued out of that case against New York Life Insurance Company, as holding an indebtedness due Mrs. Dunlevy. The Insurance Company said either Mrs. Dunlevy or one Gould owned the indebtedness. A reference was made wherein alleged process was served on Mrs. Dunlevy in California. The reference held that there was no property of Mrs. Dunlevy's in the Insurance Company's hands. The indebtedness was paid to Gould.

In the meantime Mrs. Dunlevy commenced this action in California and the Court there obtained personal jurisdiction over Gould and the Insurance Company. The latter has plead in its answer the proceedings of the State of Pennsylvania.

Is this record of proceedings in Pennsylvania a good plea in bar?

Brief of Argument.

In order to prove that the exemplified record of Pennsylvania proceedings attached to the answer herein, has been given full faith and credit by the trial Court and does not constitute a plea in bar, the respondent contends as follows:

1. That the exemplified record of the Pennsylvania proceedings is not *res adjudicata* of any fact, as no judgment has been rendered or entered therein.

2. That if judgment had been rendered in the Pennsylvania proceedings, the proceedings would not have been *res adjudicata* of any fact, as regards respondent.

3. That if judgment had been rendered in the Pennsylvania proceedings, no fact would have been *res adjudicata* against respondent, as the record of the proceedings discloses neither jurisdiction *in personam* or *in rem*.

4. That the argument of the petitioner is without merit.

I.

THE EXEMPLIFIED RECORD OF THE PENNSYLVANIA PROCEEDINGS IS NOT RES ADJUDICATA OF ANY FACT, AS NO JUDGMENT HAS BEEN RENDERED OR ENTERED THEREIN.

The petitioner has contended that the full faith and credit clause of the Constitution required the District Court to grant to the Pennsylvania pro-

ceedings the same consideration that a Pennsylvania Court would have granted it in a like situation. This principle of law is conceded. What would the Pennsylvania Court have done if there was set up as a plea in bar, a proceeding which disclosed a verdict but no judgment?

The facts are, as assumed in the question. There is a verdict, contained in the proceedings (p. 110). *There is no judgment.*

The Supreme Court of Pennsylvania has determined that where a proceeding discloses a verdict and no judgment it is not *res adjudicata* and is not a plea in bar.

Dougherty v. Lehigh C. & N. Co., 52 Atl. 18 (Pa.);

Bennet Water Co. v. Burgess of Millvale, 50 Atl. 155 (Pa.);

Middleton Mfg. Co. v. Phila. R. R. Co., 22 Atl. 747, 748 (Pa.).

In the first case cited, *Dougherty v. Lehigh C. & N. Co.*, 52 Atl. 18, the situation presented was a proceeding which, like the one under consideration, had gone to verdict but not to judgment. In discussing the law the Court says:

> "The offer of the record in the suit of March term, 1900, No. 209, was made, as was stated in the Court below as well as here, for the purpose of showing that the claim of the appellant to the money in the hands of the Lehigh Coal & Navigation Company was *res adjudicata*, the verdict in her favor being, as contended, a bar to the plaintiff's right to recover in this suit. The offer was disallowed for no reason given

by the Court at the time, but in his opinion refusing a new trial it is evident that it was excluded by the learned judge because the suit was between other parties, and for the still better reason that there had been no judgment on the verdict. For this latter reason we sustain the Court's ruling. If judgment had been entered on it, it would have been conclusive upon the parties to the issue in which it was rendered of what the jury had found; but with no judgment on it, it was inadmissible. Whart. Ev. s. 781; Black. Judgm. s. 506; Middletown Mfg. Co. v. Philadelphia R. R. Co., 145 Pa. 187, 22 Atl. 747, 748. 'No question becomes *res adjudicata* until it is settled by a final judgment. For this reason the verdict of a jury is not admissible as evidence to create an estoppel before it has received the sanction of the Court by passing into a judgment. Until then it is liable to be made nugatory by an order arresting judgment or granting a new trial' (Freem. Judgm. s. 251)."

II.

IF JUDGMENT HAD BEEN RENDERED IN THE PENNSYLVANIA PROCEEDINGS, THE PROCEEDINGS WOULD NOT HAVE BEEN RES ADJUDICATA OF ANY FACT AS REGARDS THE RESPONDENT.

Petitioner, the New York Life Insurance Company, had been served with garnishment process, directed against Mrs. Dunlevy's property. It answered disclosing an indebtedness to which there was a claimant, Joseph W. Gould, stated that it did not know the owner thereof, and asked for a rule of interpleader. This was granted, and alleged process was served on Mrs. Dunlevy in Cali-

fornia. The issue presented by the rule of interpleader was to "ascertain to which of said parties the money in the hands of the New York Life Insurance Company belongs" (p. 70). Correctly, the issue was not to whom certain money belonged, but to whom the Insurance Company's indebtedness belonged. Later the Insurance Company, under no stipulation thereto by respondent, paid into Court a certain sum of money, equal to the indebtedness referred to above. The issue was framed, a so-called trial was had, and verdict was rendered thereon in favor of Joseph W. Gould. Though no judgment was rendered thereon, no point is made of that fact under this topic.

Assuming therefore that judgment was rendered in the Pennsylvania proceedings and that therefore certain facts became *res adjudicata* in the Pennsylvania Court, the question arises, what are these facts?

Only two possible facts could have been determined, as only two facts were placed in issue: the Insurance Company questioned its indebtedness to Mrs. Dunlevy; this question depended upon the issue of ownership of the debt. There were then only these two possible issues; first whether the Insurance Company was indebted; second, whether Mrs. Dunlevy owned the indebtedness. This being so, the judgment, assuming one was rendered and entered, adjudicated:

(1) That the Insurance Company as garnishee was not indebted to Mrs. Dunlevy, the judgment debtor.

(2) That Mrs. Dunlevy was not the owner of the indebtedness.

The first of the adjudications offered as a plea in bar, presents a situation where a garnishee is setting up a defense of *res adjudicata* to an action by his creditor, the judgment debtor in the action out of which the garnishment issued. Restated in the present case, the situation presented is this: the Insurance Company having been discharged as garnishee in the action of *Boggs & Buhl v. Dunlevy* is setting up that discharge as *res adjudicata* in an action by Mrs. Dunlevy against the Insurance Company. However, it is not the law that a discharge to a garnishee is *res adjudicata* in an action by the judgment debtor against the garnishee.

In *20 Cyc.* 1149 the law applicable is stated in the following words:

> "The effect of a judgment in favor of the garnishee is to discharge him from liability in the garnishment proceeding but is not a bar to an action against him by the principal defendant for the same debt or demand, nor is it a bar to a recovery by another creditor of the same defendant."

Finch v. Alexander County Nat. Bank, 65 Ill. App. 337;

Hukill v. Yoder, 29 Pittsb. Leg. T. (Pa.) 94;

Hilliard v. Burlington Shoe Co., 76 Vt. 57, 56 Atl. 283;

Laport v. Bacon, 48 Vt. 176;

Hamilton Nat. Bank v. Horton, 63 N. H. 234, 44 Atl. 296;

Lewis v. Tanes, 4 Phila. (Pa.) 276.

To the same effect see

Cummings v. Edwards, Wood & Co., 103 N. W. 709; 106 N. W. 304.

Shinn on Attachments and Garnishments, states the rule of law in these words (section 725):

> "On the principle last above stated that the judgment entered in a garnishment suit is not *res adjudicata* between the garnishee and the principal defendant except as to the amount admitted by the garnishee and determined by the Court to be due, a judgment discharging the garnishee may not be shown by him as a fact in defense of an action thereafter brought against him by such principal defendant or his assignee on the same demand. Such judgment is only decisive of the garnishment, plaintiff's right to require payment of the garnishee and the defendant or his assignee may thereafter proceed in an action in law against the person that was proceeded against in garnishment in the same matter and to the same effect as though no such garnishment proceedings had ever been instituted."
>
> (Citing *Webster v. Adams,* 58 Me. 317;
>
> *Puffer v. Graves,* 26 N. H. 256;
>
> *Ruff v. Ruff,* 85 Pa. St. 333.)

One of the cases referred to above is of particular weight as an authority, because it was decided in the State of Pennsylvania. The facts in that case are as follows:

One M. Ruff executed and delivered his note in a certain sum to C. P. Ruff, who assigned the same to Hillis. Prior to the assignment one Barclay secured a judgment against C. P. Ruff and had garnishment process issued, directed to, and served on M. Ruff as garnishee. Trial upon the garnishment resulted in a verdict for M. Ruff. In the action by Hillis, assignee of C. P. Ruff against M. Ruff on the note, M. Ruff set up the judgment rendered in the garnishment trial as *res adjudicata.*

The Court held:

> "The one question for us to resolve is, was C. P. Ruff by reason of his having been served with the writ of attachment such part or privy to this issue as would make the judgment therein binding on him. * * * But if he was such a party then should he have been included in the issue and the jury should also have been sworn as to him? This, however, was not done, and why not? The answer is because he had no standing as a party against the garnishee and was therefore properly excluded from a participation in the trial. If he had aught to say against the judgment from which the attachment issued he might have pleaded and had issue; it is that he might have such opportunity that the Act of Assembly directs that notice be given the debtor if he is in the county. With such trial, however, the garnishee has no concern, neither is prerequisite to a trial against him. * * * It is thus apparent that the two issues are quite distinct and that whilst in the latter the garnishee has no interest, in the former the debtor has none. * * *
>
> What shall we say then; that the debtor is concluded by the result of an issue in which he has no interest; from which by legal rule he is included, in which he cannot be heard ex-

> cept as a witness, and which does not conclude his creditors? * * * If one is to be concluded by a judgment he must have his day in Court, some say in and control over the trial. But C. P. Ruff had neither control over nor say in the issue between Barclay and the garnishee. Barclay might have permitted the case to go by default; he might have discontinued it or he and the garnishee might have compromised and C. P. Ruff could not have intervened to prevent either. He was literally barred out of the case and for the sufficient reason that he was no party to it. However, by all rules he is not concluded by the judgment resulting from the trial."

The second matter which was possibly adjudicated by the Pennsylvania proceedings was that Joseph W. Gould was the owner of the indebtedness. However, this determination of the rights of Mrs. Dunlevy was determined without personal service on Mrs. Dunlevy, she being served in the State of California with alleged process (p. 77) and having never appeared.

A determination of personal rights without jurisdiction *in personam* is ineffectual.

> *Pennoyer v. Neff*, 95 U. S. 714;
> *Dull v. Blackman*, 169 U. S. 243, 42 L. ed. 733.

From the preceding argument it is apparent that only two matters could possibly have been adjudicated by the Pennsylvania proceedings, and that neither of these matters constitute *res adjudicata* to the claim of respondent. Any other matters not necessary to the judgment, matters without

which the judgment could have been pronounced, are not *res adjudicata* for any purpose.

Thorman v. Frame, 176 U. S. 350, 44 L. ed. 500.

The foregoing contentions necessarily assume that the Pennsylvania Court had jurisdiction over respondent and we shall presently show that not only did it not have jurisdiction over respondent, but that the proceedings themselves are materially defective.

III.

IF JUDGMENT HAD BEEN RENDERED AND ENTERED IN THE PENNSYLVANIA PROCEEDINGS, NO FACT WOULD HAVE BEEN RES ADJUDICATA AS AGAINST RESPONDENT BECAUSE THE RECORD OF THE PROCEEDINGS DISCLOSES NEITHER JURISDICTION IN PERSONAM NOR IN REM.

The full faith and credit clause of the Constitution does not preclude inquiry into the jurisdiction of the Court in which the judgment is rendered, over the subject matter, the parties affected by it, nor the facts necessary to give jurisdiction.

Thorman v. Frame, 176 U. S. 350, 42 L. ed. 50, and cases cited.

A thorough exposition of the proposition of this topic is contained in the opinion of the Circuit Court of Appeals, Ninth District, rendered in deciding this case. The opinion reads as follows (214 Fed. 6):

> "It is contended that the plaintiff's cause of action is barred by the proceedings in the

court of Pennsylvania, which are pleaded in the amended answer. In 1907, while the plaintiff was a resident of the state of Pennsylvania, Boggs & Buhl recovered judgment against her for a debt, in a court of that state. Some two years later execution was issued upon the judgment, and Joseph W. Gould and the local agent of the defendant were garnished. The defendant in answering the writ set forth the fact of the issuance of the policy and the assignment thereof, and alleged that Gould claimed to be the owner thereof. Gould answered, claiming that the policy and all rights thereunder belonged to him. At that time the plaintiff had become a resident of the state of California. The statutes of Pennsylvania provide that when the sheriff is notified that the property which he has levied upon belongs to a person other than the defendant in the execution process, he shall enter a rule in the court, out of which the execution or process issued on the claimant, to show cause why an issue should not be framed to determine the ownership, and that notice of the rule shall be given to the plaintiff, the defendant and the claimant. 2 Purdon's Digest (13th ed.) p. 1551. On February 5, 1910, on the petition of the garnishee, a rule was granted on the plaintiff and the defendant in the execution, and also upon Joseph W. Gould, the claimant, to show cause why they should not interplead, and why the insurance company should not be permitted, when it was determined to whom the money ought to be paid, to pay the same into court for the benefit of the person entitled to receive the same, and that service of a copy of the rule, petition, and the order be made upon Mrs. Dunlevy by serving her personally at her residence in California. The rule was made returnable February 26, 1910. It appears by an affidavit that on February 18, 1910, personal

service was made upon her, in San Francisco. The papers served upon her were a copy of the petition of the insurance company, a notice of its attorneys, and a copy of the order of the court of date February 5, 1910, reciting that a rule was granted on Effie J. Dunlevy, Joseph W. Gould, and Boggs & Buhl, to show cause why they should not interplead together, for the purpose of ascertaining to which of the parties the money in the hands of the insurance company belonged, and the order recites:

'And it appearing that Effie J. Dunlevy is a resident of the State of California it is hereby ordered and decreed that service of said rule upon Effie J. Dunlevy be by serving her personally with a copy of this petition and order, or by sending a copy of same by mail, or registered mail, to her at her last known address. Rule returnable the 26th day of February, 1910.'

The only attestation of the order are the words appended thereto, 'By the Court'. Mrs. Dunlevy made no appearance in the proceeding, and on May 3d an order of the court was made framing the issue, which was whether Joseph W. Gould made a valid gift of the policy to Effie J. Dunlevy. While the insurance company expressed its willingness to pay the money into court, it was not actually paid into court until March 19, 1910. On September 19, 1910, a jury returned a verdict in the cause entitled Boggs & Buhl, A. J. Gould, and Lincoln National Bank, Intervenors, v. Joseph W. Gould, as follows: 'We, the jurors, impaneled in the above entitled case, find a verdict for the defendant.' No judgment was ever entered upon the verdict of the jury, but upon October 1, 1910, the court ordered that the money be paid to Joseph W. Gould. Counsel for plaintiff contend that the service of the rule to show cause and the other papers was ineffectual to

require the plaintiff's appearance on these proceedings, and that the court never acquired jurisdiction of her. Where the object of an action is to determine personal rights only, and the proceeding is merely in personam, constructive service on a non-resident 'is ineffectual for any purpose'. Dull v. Blackman, 169 U. S. 243, 18 Sup. Ct. 333, 42 L. ed. 733. But assuming that the proceeding in the court of Pennsylvania was a proceeding *quasi in rem*, the object of which was to determine to whom belonged the money that has been seized under the writ of the court, and that the money owing by the insurance company, notwithstanding that it had not been paid into court when the rule to show cause was made, was in legal effect in possession of the court and subject to its judgment, we have to inquire whether the service was made in accordance with the laws of the state. The law to which we must refer is found in the act of April 6, 1859, 2 Purdon's Digest (13th ed.) 1422, which provides that it shall be lawful for any court of Pennsylvania having equity jurisdiction of any suit concerning goods, chattels, etc., or liens, mortgages, on incumbrances thereon, or where any court has acquired jurisdiction of the subject-matter by service of its process on one or more of the principal defendants, to order and direct that any subpoena or other process in such suit may be served upon any defendant then residing out of the jurisdiction of the court, and upon affidavit of such service to proceed as fully and effectually as if the same had been made within the jurisdiction of the court. But the statute expressly provides that—'such order limit a time, depending on the place where such process is to be served, after the service thereof, within which compliance with the requirements thereof must be made by such defendant or defendants; such process to be returnable at

such time after the service thereof, as such court shall, by special order, direct'.

The proceedings in the case under consideration fail in several respects to comply with these provisions of the statute. But the most vital defect is that the order wholly fails to limit a time, after the service thereof, within which compliance with the requirements thereof must be made, or to direct by 'special order' that the process be returnable at a stated time after the service thereof. The order which was served upon Mrs. Dunlevy was returnable in the court of a distant state within eight days after the service upon her, while if she had been a resident of that state and served therein, she could not, under the state law, have been required to appear and plead until 10 days after the date of the service. 1 Purd. Dig. (13th ed.) p. 244. No default was taken against her, and nowhere in the proceedings of that court is there a recital or finding that service had been made upon her. The records show that from and after the return of the service upon her of the order to show cause, she was ignored in the proceedings. Substituted service upon a non-resident defendant being of statutory origin, the law must be strictly complied with (Jennings v. Johnson, 148 Fed. 337, 78 C. C. A. 329), and where the service is so defective as not to confer jurisdiction on the court, the judgment is open to collateral attack. Johnson v. Hunter, 147 Fed. 133, 77 C. C. A. 359; Guaranty Trust Co. v. Green Cove Railroad, 139 U. S. 137, 11 Sup. Ct. 512, 35 L. ed. 116; Noble v. Union River Logging Railroad, 147 U. S. 165, 173, 13 Sup. Ct. 271, 37 L. ed. 123. In Amy v. Watertown No. 1, 130 U. S. 301, 316, 9 Sup. Ct. 530, 536 (32 L. ed. 946), the court said:

'The cases are numerous which decide that where a particular method of serving process

> is pointed out by statute, that method must be followed.'
>
> And on page 317 of 130 U. S. on page 536 of 9 Sup. Ct. (32 L. ed. 946) the court quoted with approval the following language of the Supreme Court of Wisconsin:
>
> 'When the statute prescribes a particular mode of service, that mode must be followed. *'Ita lex scripta est.'* There is no chance to speculate whether some other mode will not answer as well. This has been too often held by this court to require further citations'."

To the foregoing quotation we desire to add the following additional reasons which show conclusively that the Pennsylvania proceedings were defective.

1. Under the Act of April 6, 1859, *2 Purdon's Digest* (13th ed.), 1422, we contend that a non-resident must be served with process. The only papers served upon respondent were a notice to Mrs. Dunlevy by the attorneys for the New York Life Insurance Company for the granting of the rule to show cause, a copy of the petition of the New York Life Insurance Company for the rule, and a copy of the order of the Court granting the petition of the New York Life Insurance Company by ordering the rule granted served upon Effie J. Dunlevy, Joseph W. Gould and Boggs and Buhl, and ordering, in particular, that service of said rule "upon Effie J. Dunlevy be by serving her personally with a copy of this petition and order, or by sending a copy of the same by mail or registered mail to her at her last known address."

The portion of the order just quoted does not conform with the statute, for under the statute considered under this subdivision, not only must a copy of the order authorizing the service be served upon a defendant, but also a copy of the bill or petition for such process by "a subpoena thereon, but if not, a statement of the substance and object of the proceeding whereon the same is founded."

In other words, under this statute, the following papers must be served upon a defendant out of the jurisdiction of Pennsylvania:

1st. Process of some character, being a writ in the form of either a summons or a subpoena, directing them to appear within a certain time and answer to the merits of a particular cause of action;

2nd. A copy of the order authorizing the service of the process;

3rd. If the subpoena is the process, then there must be, in addition, a copy of the bill or petition; or

4th. If a subpoena is not the process, then a statement of the substance and object of the proceeding.

In the case at bar, the petitioner proceeded evidently upon the theory that a subpoena would be the proper process for they served upon Mrs. Dunlevy a copy of the order authorizing the service, a copy of the bill or petition, but there was no process served, and this therefore renders the pro-

ceeding entirely defective. That process should be distinguished from the order authorizing it is evident from the language of the statute, which reads as follows:

> "And further provided that when such process shall be served, such defendant or defendants shall *also* be served with a copy of the order authorizing the service thereof, etc." (Italics ours.)

2. The law of Pennsylvania calls upon the claimant to accept the burden of proof.

Gallagher v. Davis, 179 Pa. St. 504, 36 Atl. 319;

2 Purdon's Digest (13th ed.), p. 1555.

In the proceedings in this case the claimant, Joseph W. Gould, is made defendant and thereby he was not made to accept the burden of proof.

3. No bond was ever filed by or required of Joseph W. Gould as provided for under the laws of Pennsylvania.

2 Purdon's Digest (13th ed.), p. 1553.

4. The sheriff did not enter the rule as required by the laws of Pennsylvania.

2 Purdon's Digest (13th ed.), p. 1551.

5. Respondent was not allowed 15 days after notice of the rule within which to file her affidavit as provided for under the laws of Pennsylvania.

2 Purdon's Digest (13th ed.), p. 1555.

6. No motion was ever made by Joseph W. Gould for, nor did the Court order, a *judgment*

entered against respondent for failing to file the affidavit required by law.

2 Purdon's Digest (13th ed.), p. 1555.

In conclusion to this topic we desire to point out that only in two ways could the Pennsylvania Court have acquired jurisdiction, that is either *in personam* or *in rem*. It did not acquire jurisdiction *in personam* because Mrs. Dunlevy was not served with process within the State of Pennsylvania. It did not gain jurisdiction *in rem*, because 1st, the Court itself determined that it withheld no property of Mrs. Dunlevy's; and, 2nd the procedure to gain jurisdiction *quasi in rem* was not complied with nor followed.

IV.

REPLY TO PETITIONER'S ARGUMENT.

A. *The proceedings of the Pennsylvania Court were not regular and did not conform to the law and usage of the Courts of Pennsylvania as contended in Topic II of Petitioner's Brief.*

This has been discussed under the preceding Topic.

On page 13 of petitioner's brief, third paragraph thereof, the Insurance Company repudiates the proceedings which it has offered as a plea in bar. The proceeding, if it determines anything, determines that the company was not indebted to Mrs. Dunlevy, that the company was discharged and that

the garnishment process was ineffective, as it could not restrain any property of Mrs. Dunlevy, because, under the garnishment proceedings, she had none in the company's hands.

Considering the facts, misstated in the topic, as correct, still it appears that the Pennsylvania proceedings did not conform to law and usage of Pennsylvania. In particular it appears:

1. That no judgment was ever rendered or entered in the proceedings relied on.

2. That the rule of interpleader had no time noted therein within which Mrs. Dunlevy was to comply with its commands (p. 44).

3. That Mrs. Dunlevy was served in California, with alleged process eight days before the return date thereof when, if served in Pennsylvania, the date thereof would have had to be at least ten or fifteen days prior to the return date.

4. That petitioner at no time disclosed the present action and the jurisdiction herein of all parties in the California Courts, to the Pennsylvania Court (pp. 11, 14).

5. That the burden of proof was not placed on claimant (p. 96).

6. That in fact, no process was ever issued or served upon respondent in the feigned issue proceedings.

7. That no special order was ever made directing when the process, assuming that it was issued, was to be returnable *after* the service thereof.

8. That the rule on interpleader was not entered by the sheriff as required by law.

9. As a corollary to No. 8 hereof, the rule entered by petitioner was not authorized by statute but may be, for purposes of argument, considered a common law right.

10. That no bond was ever required of Joseph W. Gould, the claimant.

B. *By the law and usage of the Pennsylvania Courts the Insurance Company did not, as contended in Topic III of the petitioner's brief, discharge its obligation to Mrs. Dunlevy, when pursuant to the writ served upon it and the order of the Court, it paid what it owed her into Court to the credit of the cause to which she was not a party and not in Court.*

This conclusion is erroneous in two particulars. First, that a determination of an issue raised by interpleader, after garnishment, as in this case, is a continuation of the judicial proceedings in which a judgment was rendered against the judgment debtor, Mrs. Dunlevy; second, assuming that jurisdiction does continue, that the order in question i. e. payment into Court, would bind Mrs. Dunlevy.

To take up the first erroneous phase of the conclusion. The garnishment issue as to the ownership of the debt owed by the Insurance Company was not a part of the original action of *Boggs & Buhl v. Dunlevy* to the extent that the jurisdiction

acquired in that cause extended to the garnishment issue.

Ruff v. Ruff, 85 Pa. St. 333.

Moreover it has always been the accepted theory that jurisdiction in a garnishment matter depended upon an *effective process* served upon the garnishee wherever found, not upon a continued jurisdiction over the principal defendant.

Harris v. Balk, 198 U. S. 215, 49 L. ed. 10;
Louisville & N. R. Co. v. Deer, 200 U. S. 176; 50 L. ed. 426.

At this point it is advisable to call the Court's attention to the fact that in the original action of *Boggs & Buhl v. Dunlevy,* the defendant was served constructively (p. 34). It does not appear affirmatively from the record that said defendant was at the time of the constructive service a resident of Pennsylvania nor does there appear affirmatively any basis for such constructive or substituted service. This would ordinarily render the judgment itself void.

Pennoyer v. Neff, 95 U. S. 714.

But assuming that Mrs. Dunlevy was properly served in the first instance, the Court merely had jurisdiction over her for the purpose of rendering a judgment against her by default, or if she had appeared, the Court would have had jurisdiction over her for the purpose of hearing the case upon its merits.

Not having appeared and a judgment having been taken by default, the jurisdiction of the Court over Mrs. Dunlevy came to an end with the entry of the default judgment.

Let us assume that Mrs. Dunlevy was living in Pennsylvania after the judgment had been entered and that she had property in her possession which could have been subjected to the payment of the judgment. In order to have compelled her to do so it would have been necessary to have served her with some process by which she would have been compelled to have appeared in Court and turned over to the sheriff the property which she had in payment of the judgment outstanding against her. She, however, being out of the jurisdiction of the State of Pennsylvania, process of this character was not available.

Now, then, let us assume that the New York Life Insurance Company in Pennsylvania had property belonging to the judgment debtor. It is unquestionably true, that if there had been no question but what the moneys or the debt under the control of the New York Life Insurance Company belonged to Mrs. Dunlevy that no further jurisdiction over the person of Mrs. Dunlevy would have been necessary and that upon service of the writ of execution attachment on the New York Life Insurance Company, jurisdiction over Mrs. Dunlevy would have been acquired by virtue of the jurisdiction which the Court had over the *res* belonging to her. However, in the execution attachment, the New York

Life Insurance Company did not admit its liability to Mrs. Dunlevy and therefore it was not apparent by this denial of liability that Mrs. Dunlevy had property in the State of Pennsylvania.

These facts, considered together with the fact that Mr. Gould later appeared, and claimed title to the moneys in the possession of petitioner, and that the title to these moneys was afterwards tried by the Court, show rather conclusively that while the trial of title to the fund, which has been termed the "feigned issue," was precipitated by the judgment obtained against Mrs. Dunlevy in favor of Boggs & Buhl, at the same time it is obviously such a collateral proceeding or such an independent proceeding that it is indeed a stretch of imagination to state that having acquired jurisdiction over Mrs. Dunlevy solely for the purpose of rendering and satisfying a judgment against her on a claim of goods sold and delivered, that thereby the Court had also acquired jurisdiction for the purpose of trying her title to any property in which she might have an interest in the State of Pennsylvania, which property might be subjected to the payment of said judgment.

To take up the second erroneous phase of the conclusion: Assuming that the jurisdiction acquired over Mrs. Dunlevy in *Boggs & Buhl v. Dunlevy* did extend to the garnishment issue, nevertheless the payment into Court was not of such a nature as to bind Mrs. Dunlevy.

Giving to the Pennsylvania proceedings their fullest effect as a part and parcel of *Boggs & Buhl v. Dunlevy* it is discovered that the garnishment proceeding determined that the garnishment process issued in *Boggs & Buhl v. Dunlevy* was ineffective because the reference growing out of the garnishment was to discover if any property of the judgment debtor was in the hands of the garnishee, and did discover that there was none. Consequently, to hold Mrs. Dunlevy to the garnishment proceedings would be to determine that the Insurance Company was discharged as garnishee of her property, and consequently any payment into Court by it, under that ineffective garnishment could not be a payment of her property, but the property of someone else. Therefore, binding Mrs. Dunlevy to the garnishment proceeding, the petitioner discovers as his goal, that no property of Mrs. Dunlevy was garnished, and no money belonging to her was paid into Court.

In addition, we desire to call the Court's attention to the fact that the payment into Court was an *ex parte* proceeding. No service of the petition to that end upon, nor any consent thereto by respondent is claimed or set forth. The matter therefore, under no condition could be a matter demanding credit in a sister state.

Thorman v. Frame, 176 U. S. 350, 44 L. ed. 500.

In this Topic III petitioner relies quite confidently upon the United States Supreme Court decision

of *Michigan Trust Co. v. Ferry,* 228 U. S. 346; 57 L. ed. 867. The question presented here, however, falls short of the case relied upon. Petitioner is attempting here to sustain the Pennsylvania proceedings when it is apparent that no judgment of any character had been ever entered, and that they are defective for other reasons. These Pennsylvania proceedings would have no standing in the Pennsylvania courts (see Topic I). The Michigan proceedings introduced in the Utah courts were complete, a judgment had been rendered and it could have been acted upon in the Michigan courts.

Moreover, as pointed out above, the garnishment part of the Pennsylvania proceedings are not a part of the main action. A discharge of a garnishee is not a defense to an action by the judgment debtor against the garnishee (*Ruff v. Ruff,* supra). And further, even enforcing the garnishment proceedings upon Mrs. Dunlevy, their effect is only that the garnishee was discharged and the money paid by the garnishee was not her money. It could not adjudicate Mrs. Dunlevy's rights to the ownership of property because the Court itself determines it has no jurisdiction *in rem* or *quasi in rem,* and further because of the fact that no personal or constructive service was had on Mrs. Dunlevy in the feigned issue.

The other decisions cited in Topic III are from the Pennsylvania courts. They are all based upon situations of facts assumed in the topic but not found in the Pennsylvania proceedings offered as

a plea in bar. The cases all depend upon a finding of the payment into Court of Mrs. Dunlevy's property. The garnishment proceedings introduced as a plea in bar determines that it was not Mrs. Dunlevy's property.

In paragraph 3 under Topic III petitioner states that the payment into Court was equivalent to an assignment by Mrs. Dunlevy to Boggs & Buhl. But there was no property of Mrs. Dunlevy to assign. Boggs & Buhl received no fruits of that payment. By the proceedings, the fund was held not to be the property of Mrs. Dunlevy and consequently Boggs & Buhl as the judgment creditors who garnisheed, received nothing.

The situation would be different if the petitioner (after an inspection of the record in the case of *Boggs & Buhl v. Dunlevy* had found a valid judgment based upon a valid service of summons) had paid and satisfied the judgment in the case of *Boggs & Buhl v. Dunlevy* and claimed the amount so paid as a credit on the indebtedness owing Effie J. Dunlevy. But they have not done so. The creditor's judgment has not been paid, and although the Federal Courts of California have squarely decided on the question of ownership, in favor of Effie J. Dunlevy, if petitioner prevails before this Court, she will not receive her property and the judgment of Boggs & Buhl against her will still be an existing obligation.

No more complete method could be devised of depriving a person of property through the chan-

nels of the courts after the only Court having jurisdiction of all the parties had decided the litigation in favor of the respondent.

If the judgment in the case of *Boggs & Buhl v. Dunlevy* was a horse good enough to carry the money into Court for the petitioners, they should feed the animal when they arrive at their destination and not be permitted to turn the beast out to starve.

It might be said that by the terms of the insurance policy that the money was payable in a lump sum only and that the demand could not be split. There is nothing more sacred about an obligation due on an insurance policy than there is about any other debt, and if they had been compelled to pay the amount of the judgment debt there is no warrant of law for paying the remainder of the debt into a foreign Court and leave the creditor to his own resources to secure the money if he can.

Obligations cannot be discharged in that manner.

Conclusion.

In conclusion the respondent desires again to call to this Court's attention that full faith and credit has been given to the record of the Pennsylvania proceedings offered as a plea in bar, but that it does not conclude the respondent because:

1. The proceedings disclose that no judgment has been rendered or entered and that fact by the law of Pennsylvania precludes the proceeding being *res adjudicata* in any Court.

2. The Pennsylvania proceedings could be *res adjudicata* upon but two issues; the question of property of the judgment debtor being in the hands of the garnishee, and the question of ownership of a certain indebtedness; the determination in the Pennsylvania proceedings that there was no property of the judgment debtor in the hands of the garnishee, is not *res adjudicata* in an action in Pennsylvania by the judgment debtor against the garnishee; the determination of the ownership of the property was without jurisdiction of a claimant thereto and therefore not *res adjudicata* as to that claimant.

3. The Pennsylvania Courts did not acquire jurisdiction *in rem* or *quasi in rem* because the procedure of that state to acquire such jurisdiction was not complied with, and the subject matter of such jurisdiction (Insurance Company's indebtedness to Mrs. Dunlevy) was declared by that Court not to be *in esse;* the Pennsylvania proceedings do not show jurisdiction *in personam*, as it appears therein that Mrs. Dunlevy was personally served with alleged process in a distant state.

4. The argument of the petitioner is based upon the following false assumptions:

a. That the proceedings show that the Insurance Company was indebted to Mrs. Dunlevy which it does not.

b. That property of Mrs. Dunlevy was restrained by the garnishment process which it was not.

c. That the procedure of Pennsylvania as to a rule of interpleader and the service thereof was complied with, which it was not.

d. That there was a judgment entered in the Pennsylvania proceedings of which there was none.

e. That a judgment of discharge of garnishee was *res adjudicata* in an action by the judgment debtor, which it is not in Pennsylvania.

f. That a garnishment proceeding in Pennsylvania is such a continuation of the main action that the jurisdiction therein carries over into the garnishment proceedings, which it does not.

g. That payment of money by a garnishee into a Court which does not obtain jurisdiction over all the claimants to said money, releases said garnishee, which it does not.

Wherefore respondent respectfully submits that the decision and judgment of the District Court and Circuit Court of Appeals be affirmed.

Dated, San Francisco,
February 3, 1916.

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